

U.S. Department of Labor

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June 20, 2017

VIA ELECTRONIC MAIL ONLY

Warrington Parker
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The Orrick Building
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wparker@orrick.com

Re: *OFCCP v. Oracle America, Inc.*, Case No. 2017-OFC-00006,
Government's Informant privilege

Dear Mr. Parker:

I write to respond to an issue you raised in your letter of June 12, 2017 regarding OFCCP's assertion of the Government's Informant privilege with respect to portions of certain interviews.

In your letter, you objected to OFCCP's assertion of the privilege in the context of interviews where Oracle was already aware that the subject of the interview spoke with OFCCP. However, because Oracle does not know the contents of those witnesses' confidential statements to OFCCP, it does not know what those employees had to say about Oracle. Accordingly, Oracle does not know that these witnesses were 'informants' in the sense that is protected by *Rovario* and its progeny. As the Fifth Circuit recognized more than forty years ago, knowing the identity of individuals who have spoken to the government is not equivalent to knowing that those individuals are "informants." *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*, 459 F.2d 303, 306 (5th Cir. 1972). "Only when the content of a statement is disclosed will it be revealed whether the information was given reluctantly or voluntarily, whether the tone and manner in which it was given was friendly to the defendant or unfriendly, and whether it was accusatory or favorable." *Id.*; see *U.S. Dep't of Labor v. La Familia Corp.*, 2012 WL 1715359, at *4 (D. Kan. 2012) (unreported) (the informant's privilege was not waived; the fact that "Defendant may have seen employees interviewed by the Government does not disclose the identity of any informer—it merely discloses the interviewees for that set of interviews").

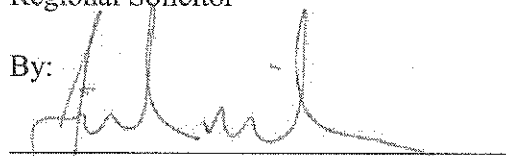
While we appreciate your offer to limit disclosed informants to "attorneys' eyes only" OFCCP cannot reveal the identity of those who are confidential government informants. OFCCP therefore will not produce the unredacted witness statements you request.

Warrington Parker
June 20, 2017
Page 2

Very truly yours,

JANET M. HEROLD
Regional Solicitor

By:

A handwritten signature in dark ink, appearing to read "Jeremiah Miller", is written over a horizontal line.

JEREMIAH MILLER
Senior Trial Attorney



July 27, 2017

Via E-Mail

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Dear Mr. Garcia:

This letter follows up on our 6/23, 6/30, 7/7, 7/12, 7/13, 7/21, 7/25, and 7/26 meet and confer discussions with respect to OFCCP's objections and responses to Oracle's Request for Documents.¹ For convenience, this letter is organized topically. However, please note that a topic may cover several Requests for Production of Documents (RFP). Additionally, Oracle's clarifications are made in good faith, for the purposes of facilitating the exchange of discovery and are made for the requests for documents only, not as an admission or acknowledgement of any position.

I. OFCCP's document production is insufficient and its approach to meet and confer has undermined Oracle's ability to determine whether a reasonable search for documents has occurred

Based on our meet and confer discussions, Oracle believes that OFCCP's production of only its investigation file is patently insufficient. Moreover, OFCCP's claimed objections that the RFPs are overbroad and confusing prohibits Oracle from determining whether OFCCP has conducted a reasonable and diligent search for documents beyond the investigative file. OFCCP has conducted its meet and confer with Oracle by requiring that the parties address each and every request one by one and that OFCCP subject Oracle to a litany of unstated objections and requests for clarification. OFCCP has objected broadly and persistently to every request, claiming that it cannot respond to the requests as written. In the interest of obtaining the discovery to which Oracle is entitled, Oracle responds as follows.

¹ We spent 13.5 hours meeting and conferring over RFPs. This is so despite the fact that RFP Nos. 1-19 closely track paragraph 7 of OFCCP's amended complaint; Oracle's RFP Nos. 20-33 track paragraph 8 of OFCCP's amended complaint; RFP Nos. 34-47 track paragraph 9 of OFCCP's amended complaint; RFP Nos. 48-64 track paragraph 10 of OFCCP's amended complaint; RFP No. 65 tracks paragraph 12 of OFCCP's amended complaint; RFP Nos. 66-68 track paragraph 13 of OFCCP's amended complaint; RFP No. 69 tracks paragraph 14 of OFCCP's amended complaint; RFP No. 71 tracks paragraph 17 of OFCCP's amended complaint; RFP No. 72 tracks paragraph 18 of OFCCP's amended complaint; and RFP No. 73 tracks paragraph 19 of OFCCP's amended complaint.



Norman E. Garcia

July 27, 2017

Page 2

II. OFCCP's objections to RFP No. 1 that seeks documents "in connection with" the "compliance review process" are unfounded, but Oracle will clarify

During the meet and confer call, OFCCP objected to Oracle's use of the term "compliance review process" in RFP No. 1 despite the facts that OFCCP did not formally object to this term "compliance review" and OFCCP used the term "compliance review" in its amended complaint and throughout its responses to Oracle's Amended Interrogatories. Nonetheless, Oracle is willing to clarify that "in connection with the compliance review process" in RFP No. 1 means whatever OFCCP did in its "compliance review" as described in paragraph 6 of the amended complaint. Oracle defines "compliance review" as an "analysis by OFCCP of the hiring and employment practices of the contractor, the written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis." This information is available on OFCCP's website.

https://www.dol.gov/ofccp/regs/compliance/faqs/ACE_faqs.htm#Q12. Please confirm that OFCCP will withdraw its objection to RFP No. 1 and respond to Oracle's requests for production with this change.

III. OFCCP's objection on the grounds of relevancy and the deliberative process privilege are confusing, and OFCCP should clarify whether OFCCP is "not producing" any documents based on its relevancy objection to these requests

OFCCP objects to each of Oracle's requests for production of documents on the grounds that "[m]aterials reflecting OFCCP's internal deliberations and processes in its investigation are not relevant

See, e.g., OFCCP Resp. to RFP No. 1. However, OFCCP also objects to each of Oracle's requests for production of documents based on the deliberative process privilege. There appears to be no difference between the deliberative process privilege and the relevancy objection referenced in this paragraph. Oracle is entitled to know whether OFCCP is not producing documents on the basis of the relevance objection quoted in the first sentence of this paragraph as those documents would not be placed on OFCCP's privilege log.

IV. OFCCP's objections based on "exemptions provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law" already include objections on the grounds of attorney work-product privilege, privileged communications with consulting experts, and privacy

OFCCP has objected to each RFP to the extent it seeks information protected by "exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law." This objection lacks the specificity required of objections. See Fed. R. Civ. P. 34(b)(2)(B) ("For each item or category,



Norman E. Garcia

July 27, 2017

Page 3

the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons.").

Furthermore, during our meet and confer discussions you indicated that this language was meant to cover, at least, the attorney work-product privilege under *Hickman v. Taylor*, 329 U.S. 495 (1947)², privileged communications with consulting experts, and privacy. Specific privilege objections have been made. Therefore, Oracle requests that OFCCP amend its response and remove the phrase "exemption provided by the Rules of Practice, Federal Rules of Civil Procedure or Evidence, or the common law." If OFCCP does not so amend its response, Oracle is entitled to know the specific objections that fall within the phrase quoted in this paragraph. Furthermore, Oracle is entitled to know what documents are being withheld that fall within the objections captured by this phrase.

V. OFCCP's objections to RFPs that refer to "lines of business" and "job functions" as plural instead of "line of business," are not well taken, but Oracle will clarify

During meet and confer discussions, OFCCP stated that it didn't know what Oracle was referring to in RFP Nos. 2, 3, and 4 that used the plural terms "lines of business" and "job functions" and sought clarification. These objections are not well taken. As a threshold matter, OFCCP did not submit written objections to these terms. Moreover, a quick review of Oracle's RFPs demonstrate that Oracle is quoting OFCCP's allegations in the complaint, which should clear up any confusion. Oracle's RFP Nos. 2, 3 and 4, seek documents related to OFCCP's allegation in paragraph 7 that Oracle discriminated against females in [1] "Information Technology . . . lines of business or job functions"; [2] "Product Development . . . lines of business or job functions"; and [3] "Support lines of business or job functions." It is clear that Oracle separated out OFCCP's allegation regarding these three lines of business into three separate requests to avoid a compound objection by OFCCP. Nonetheless, Oracle will clarify that RFP Nos. 2, 3, and 4 seek documents related to the respective "line of business or job function" in singular form with respect to each request. Please confirm that OFCCP will respond to these requests as clarified.

VI. Reserving its rights, Oracle will withdraw certain RFPs, including RFP Nos. 19, 70, 79

Without waiving our right to seek all of the documents encompassed within these requests should the issue be presented to the ALJ at some later point in time, at this time Oracle withdraws RFP Nos. 19, 70, 79.

VII. OFCCP's objection to Oracle's use of the term "related to" is unfounded, but nonetheless Oracle will agree to adopt OFCCP's definition of "relating to" in its RFPs

² I pointed out to you that OFCCP had already objected to those same requests on the specific grounds of "attorney work-product doctrine," rendering your citation to *Hickman* duplicative and unnecessary.



Norman E. Garcia
July 27, 2017
Page 4

OFCCP has asserted 76 objections to the use of the word "related to" in Oracle's RFPs. OFCCP has contended that "related to" is overbroad and unduly burdensome, despite OFCCP's use of the same term in its requests for production.³ While reserving its right to challenge OFCCP's position if the issue reaches the ALJ, in an effort to avoid unnecessary motion practice, as I mentioned in our June 30 call, Oracle is willing to adopt OFCCP's definition of "relating to" on page 5, paragraph 23, of its requests for production of documents, set two, propounded on February 21, 2017, for purposes of Oracle's requests.

VIII. OFCCP's objection to Oracle's use of the phrase "all documents related to" is unfounded (RFP Nos. 2-11, 14, 18, 20-25, 28, 32, 34-39, 42, 46, 48-59, 63, 65-69, 71-78, 80-86).

OFCCP's criticism of RFPs that ask for "all documents related to" OFCCP's allegations of discrimination in the amended complaint because they are overbroad and encompass documents "related to" a person's gender or race are not well taken. RFP Nos. 2-11, 14, 18, 20-25, 28, 32, 34-39, 42, 46, 48-59, 63, 65-69, 71-78, 80-86. For example, RFP No. 28 requests "All DOCUMENTS RELATED to the comparisons YOU made between any "African Americans" and any "comparable Whites employed in similar roles" as alleged in Paragraph 8 of the Amended Complaint." OFCCP claims that this request encompasses all documents where a person's race is identified. However, this is not a reasonable interpretation of the request. See RFP Nos. 14, 28, 42. The RFP plainly requests documents related to *OFCCP's comparison*, not related to a person's race in itself.

Likewise, RFP No. 21 seeks "All DOCUMENTS RELATED to YOUR determination of which employees are 'qualified,' as alleged in . . . the Amended Complaint, including but not limited to DOCUMENTS RELATED to the methodology used to make such a determination." Again, OFCCP claims that this request encompasses all documents where a person's race is identified. However, again, this is not a reasonable interpretation of the request. The RFP plainly requests documents related to *OFCCP's determination* and the *methodology* used, not related to a person's race in itself. See RFP Nos. 5, 6, 7, 21, 22, 23, 35, 36, 37, 49, 50, 51.⁴

OFCCP has requested that Oracle narrow any RFP that requests "all documents related to" OFCCP's allegations of discrimination in the complaint to just documents underlying facts that support OFCCP's determinations and methodologies. See RFP Nos. 5, 6, 7, 14, 21, 22, 23, 28, 35, 36, 37, 42, 49, 50, 51.

³ See OFCCP Second Set of Requests for the Production of Documents ("OFCCP RFP Set 2"), at p. 5, ¶ 23 ("RELATING TO" means constituting, memorializing, evidencing, containing, showing, supporting, contradicting, summarizing, pertaining to, or referring to, whether directly or indirectly, the subject of the particular request.") and Oracle's Request for Production, Set One ("Oracle RFP"), at p. 1, ¶ 5 ("RELATED" and all its variants, including RELATE, RELATED, and RELATING, means evidences, supports, mentions, constitutes, contains, summarizes, describes, concerns (directly or indirectly), refers to, contradicts, contravenes, or addresses in any way the subject matter of the demand.").

⁴ Of course, if OFCCP contends that certain documents are privileged, then it should list them on its privilege log.



Norman E. Garcia
July 27, 2017
Page 5

Oracle agrees that documents pertaining to the underlying facts are relevant and not privileged. *N. Pacifica, LLC v. City of Pacifica*, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003). However, the restriction proposed is not viable. For example, with respect to RFP No. 28, Oracle also seeks OFCCP's final statistical analysis comparing African Americans and comparable Whites employed in similar roles. These documents may or may not include underlying facts that OFCCP used in the comparison but would still be encompassed within the request.

OFCCP has requested that Oracle narrow RFPs that request "all documents related to" OFCCP's allegations of discrimination in the amended complaint to just documents that OFCCP relied upon and used in making its determination and comparisons. RFP Nos. 5, 6, 7, 14, 21, 22, 23, 28, 35, 36, 37, 42, 49, 50, 51, 81. Oracle agrees that documents that OFCCP relied upon and used in making its determination and comparisons are encompassed within these cited requests, and OFCCP should produce those documents. However, the RFPs encompass more than that, for example, if there were exculpatory documents when OFCCP made the determinations and comparisons, Oracle would want those documents and those documents would be encompassed within the request. Since such exculpatory documents would not necessarily be documents that OFCCP relied upon or used, Oracle cannot agree to narrow these requests as currently suggested by OFCCP.

That said, in effort to avoid motion practice, and without waiving our right to seek all of the documents encompassed within these requests should the issue be presented to the ALJ at some later point in time, Oracle is willing to consider narrowing "ALL DOCUMENTS RELATED to the comparisons" and "ALL DOCUMENTS RELATED to YOUR determination," in such a way that does not include all documents that refer to a person's race or gender or name. If OFCCP can identify what documents that contain a person's race or gender or name are implicated, then Oracle can better tailor requests RFP Nos. 2-11, 14, 18, 20-25, 28, 32, 34-39, 42, 46, 48-59, 63, 65-69, 71-78, 80-86.

IX. OFCCP's objections to "all documents" are unfounded, but Oracle is willing to provide clarification to omit photocopies, documents produced in this litigation, and certain publicly available documents

During meet and confer discussions, OFCCP claimed that the term "all documents" was over-inclusive, citing examples of when OFCCP sends documents for photocopying, documents already produced by Oracle in this litigation that have been bates stamped, the Federal Contractor Compliance Manual, Directive 307, or publicly available case law. This objection is not well taken. OFCCP did not object to the definition of "all documents" in its response to Oracle's requests for production. Moreover, OFCCP uses "all documents" throughout its own document requests. Nonetheless, in effort to meet and confer on this issue and avoid unnecessary motion practice, Oracle is willing to exclude from its definition of "all documents," those documents sent by OFCCP to vendors for photocopying, documents already produced



Norman E. Garcia
July 27, 2017
Page 6

by Oracle in this litigation that have been bates stamped, the Federal Contractor Compliance Manual, Directive 307, or publicly available case law.

- X. While not conceding the issue, Oracle will assume that OFCCP will object to any RFP on the ground that documents created after March 11, 2016, which was the date the Notice of Violation was issued, are privileged**

OFCCP objected to all of Oracle's RFPs "to the extent it seeks documents that they were created after March 11, 2016, which was the date the Notice of Violation was issued, because any such documents were created in anticipation of litigation and are protected by the work product doctrine, trial preparation privilege, and/or attorney-client privilege."

As a threshold matter, Oracle is willing to stipulate that any documents created in anticipation of litigation after December 9, 2016, the date OFCCP referred the matter for enforcement to the Solicitor of Labor's office, need not be disclosed or identified on a privilege log.

Additionally, as Oracle noted, the privilege objection is overbroad. Not every document that post-dates March 11, 2016 is privileged. Oracle provided the example that there were communications between OFCCP and Oracle that post-date March 11, 2016 and those cannot be privileged.

As a result, the objection should be withdrawn as presently stated. Moreover, any documents withheld pursuant to this objection should appear on OFCCP's privilege log.

- XI. Oracle proposes December 9, 2016, as a mutual date for privilege log cutoff**

During our meet and confer call on June 30, I explained that in my experience in litigation, the parties usually agree to a cutoff date by which they could agree that documents subsequent to that date were created in anticipation of litigation and thus would not have to be listed on a privilege log. Oracle proposes using December 9, 2016, the date OFCCP informed Oracle by letter that it had referred the matter for enforcement to the Solicitor of Labor's office.

- XII. Oracle defines the term "methodology" to mean "how" or "the way in which"**

OFCCP has objected to the use of the term "methodology" used in several requests, claiming it is "vague and ambiguous and overbroad and unduly burdensome." During our meet and confer conversation on RFP Nos. 5, 6, and 7, I responded that methodology used to make such a determination meant "how" or



Norman E. Garcia
July 27, 2017
Page 7

"the way in which" OFCCP did something. See RFP Nos. 21-24, 35-38, 49.⁵ Please confirm that OFCCP will respond to Oracle's RFPs that use the term "methodology" as clarified.

XIII. OFCCP should produce documents related to the statistical analysis used to make its determinations alleged in the amended complaint, including its methodology, how it determined individuals were qualified and comparable, and how it controlled for other factors (RFP Nos. 5-8, 21-24, 35-38, 49)

OFCCP has claimed in meet and confer discussions that its statistical analysis is privileged or not relevant including how it determined whether individuals were "comparable" or "qualified," and how it "controlled" for other factors. This position strains credulity. First, OFCCP devotes several paragraphs in its amended complaint discussing its statistical analysis, which purportedly shows how "qualified" individuals were not hired or paid like other "comparable" males or "Whites." See Am. Compl. pp. 1-2 ("OFCCP specifically found . . . statistically significant rates."); ¶ 7, p. 3 (referring to "qualified female employees," versus "comparable males employed in similar roles" and "OFCCP's analyses"); p. 3 (chart with headings "class," "Number of Female Class Members," and "Standard Deviations"); ¶ 8, pp. 3-4 (referring to "qualified African Americans" versus "comparable Whites employed in similar roles," and "OFCCP's analysis."); ¶ 9, p. 4 (referring to "qualified Asians" versus "comparable Whites employed in similar roles," and "OFCCP's analysis"); ¶ 10, p. 4 (alleging "statistically significant disparities"); ¶ 16, p. 6 (incorporating previous paragraphs 7-10).

Second, OFCCP's NOV also devotes several paragraphs and pages to its statistical analysis, qualified individuals and comparator employees, and controls. NOV, ¶ 1, p. 2 ("Based upon the analysis conducted . . . OFCCP finds that ORACLE recruited, selected and hired Asian applicants, particularly Asian Indians for PT1 roles at a rate significantly greater than their non-Asian counterparts who were equally or more qualified for the roles."); see also NOV ¶ 3, p. 4 ("Based upon the analysis conducted . . ."); ¶ 2, p. 4 ("Based on the analysis conducted . . ."); ¶ 4, p. 5 ("Based upon the analysis conducted . . ."); ¶ 5, p. 6 ("Based upon the analysis conducted . . ."). Additionally, the NOV includes an attachment with four separate charts purportedly labeled "Regression Analysis" with the headings "Year," "Class," "Class Members," and "Standard Deviation." NOV, Attachment.

⁵ This should be sufficient clarification in addition to common understanding of the word "method." See Merriam-Webster and Oxford https://www.merriam-webster.com/dictionary/method?utm_campaign=sd&utm_medium=serp&utm_source=jsonld ("a procedure or process for attaining an object"); <http://www.oed.com/view/Entry/117560?rskey=G9cGpX&result=1&isAdvanced=false#eid> ("A procedure for attaining an object").



Norman E. Garcia

July 27, 2017

Page 8

Third, OFCCP's interrogatory responses discuss OFCCP's statistical analyses, qualified individuals and comparators, and controls at length. See, e.g., OFCCP's Answer to Interrogatory No. 5 ("OFCCP evaluated and analyzed Oracle's compensation information and evidence gathered in the investigation and found statistically significant pay disparities The analyses included a multi-variate regression analysis, analyzing the pay of Oracle employees in the Information Technology, Product Development and Support areas Even after controlling for such factors in the analysis Based upon the analyses conducted . . . OFCCP found that Oracle paid female employees in [] roles significantly less than their male counterparts.").

Fourth, OFCCP's interrogatory responses incorporate the amended complaint and the NOV. See, e.g., OFCCP's Answer to Interrogatory No. 5 ("OFCCP incorporates herein the response to Interrogatory No. 2, the NOV and Attachment, and Amended Complaint. . . .").

Thus, documents responsive to RFPs regarding OFCCP's statistical analysis, determination of qualified individuals and their comparators, and controls used are directly relevant as they tend to prove or disprove OFCCP's claim that Oracle discriminated, even were the deliberative process privilege viable as to the analysis and related documents. Fed. R. Evid. 401; See, e.g., *NLRB v. Sears*, 421 U.S. 132, 161 (1975) (holding that government must disclose document when "an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by [deliberative process privilege] in what would otherwise be a final opinion."); *Pacific Gas & Elec. Co. v. Lynch*, 2002 WL 32812098, at *3 (N.D. Cal. 2002) (denying motion to quash subpoena) ("To permit the CPUC to rely on the independence of BWG's work, but to shield that work from production by invoking the deliberative process privilege, would be to permit defendants to use the privilege as both a sword and a shield."). OFCCP must produce documents in response to RFP Nos. 5-8, 21-24, 35-38, 49.

XIV. OFCCP must produce responsive documents to RFPs that refer to the amended complaint (RFP Nos. 1-69, 71-73, 79-81, 84).

During meet and confer discussions, OFCCP indicated that it opposed Oracle's RFPs that refer to the amended complaint, since the amended complaint is a document outside of the request. RFP Nos. 1-69, 71-73, 79-81, 84. This objection is not well taken. First, OFCCP did not specifically object to any request on this ground. Second, the idea that discovery requests that refer to the complaint are irrelevant is disingenuous. The Federal Rules of Civil Procedure make the pleadings the touchstone of relevance. Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim"). Third, Oracle's meet and confer discussions with OFCCP with respect to OFCCP's document requests are not a legitimate basis for OFCCP to withhold or not produce documents in response to Oracle's document requests. As the correspondence reflects, it is not merely OFCCP's reference to materials outside of OFCCP's document requests that is at issue. Part and parcel to the objection is the fact that the reference to other materials calls for a legal conclusion. Thus, OFCCP must



Norman E. Garcia
July 27, 2017
Page 9

produce documents responsive to RFP Nos. 1-69, 71-73, 79-81, 84 and should withdraw any opposition based on an RFP that refers to the amended complaint.

XV. The parties agree that OFCCP must produce documents related to underlying facts supporting OFCCP's statistical analysis

During our meet and confer discussions, OFCCP has indicated that documents reflecting the underlying facts that support OFCCP's statistical analysis are relevant. Please confirm that you will be producing or have produced documents relevant to the underlying facts, in particular with respect to, but not limited to RFP Nos. 5-7, 9-11, 14, 16, 19, 21-25, 28, 30, 33, 35-39, 42, 44, 47, 49, 52, 54, 61, 64, 74-77, 81.

XVI. Oracle's RFPs are not compound (RFP Nos. 8, 9, 10, 11, 25, 39, 48, 52, 74, 75, 76, 81)

During meet and confer discussions, OFCCP indicated that several of Oracle's RFPs were compound. As a threshold matter, OFCCP did not specifically object to *any* requests on the ground that they were compound. Furthermore, I disagree with the compound opposition since the portion that OFCCP contends is compound actually clarifies the request. For example, RFP No. 9 requests "All DOCUMENTS RELATED to the allegation in Paragraph 7 of the Amended Complaint that a standard deviation of -2.71 impacts 133 'female information technology employees.' This request includes but is not limited to final and draft DOCUMENTS showing underlying statistical data, methodologies, models and actual computations used to determine the standard deviation, as well as DOCUMENTS showing calculations and/or methodologies different from what is represented in Paragraph 7." As set forth infra, without waiving our right to seek these draft documents should the issue be presented to the ALJ at some later point in time, Oracle is not seeking drafts at this time. Otherwise, OFCCP must produce documents responsive to RFP Nos. 8, 9, 10, 11, 25, 39, 48, 52, 74, 75, 76, 81 and should withdraw its objection.

XVII. OFCCP's request for clarification for terms used in its own amended complaint are not well taken, but in any event, Oracle means whatever OFCCP meant in the quoted portion of the amended complaint

Throughout the meet and confer process, OFCCP has requested clarification for requests for production that quote language from OFCCP's amended complaint. As a threshold matter, OFCCP has not objected to these terms, so such objections are waived. Nor could OFCCP object to these terms since the terms are ones that OFCCP used in its own amended complaint.

Nonetheless, and without waiving our right to seek all of the documents encompassed within these requests should the issue be presented to the ALJ at some later point in time, Oracle agrees that for any RFP that quotes the amended complaint, the definition of the quoted language is whatever meaning OFCCP ascribed to that word. See, e.g., RFP No. 7 ("ALL DOCUMENTS RELATED to your



Norman E. Garcia
July 27, 2017
Page 10

determination of which 'roles' are 'similar' as alleged in Paragraph 7 of the Amended Complaint . . ."); see also, e.g., RFP Nos. 34, 51, 65, 66, 67, 68, 69.

XVIII. OFCCP's requests to clarify terms like "model," "statistics," "computations," and "statistical analysis" are not well taken given OFCCP's use of the same and similar words in the complaint, discovery, and the NOV

During our meet and confer discussions, OFCCP stated that it was confused as to terms like "model," "statistics," and "statistical analysis." These objections are not well taken, especially given that OFCCP uses those terms throughout the NOV, the amended complaint, and its interrogatory responses. See, e.g., NOV, Attachment A, p. 10 ("OFCCP analyzed Oracle employees' compensation data by Oracle job function using a *model* that included . . ." (emphasis added)); Am. Compl. ¶¶ 7-10 (referring to allegations regarding "*statistically* significant rates"; "OFCCP's analyses"; and "standard deviation" (emphasis added)); OFCCP's Answer to Interrogatory No. 5 ("OFCCP evaluated and analyzed Oracle's compensation information and evidence gathered in the investigation and found statistically significant pay disparities . . . The analyses included a multi-variate regression analysis, analyzing the pay of Oracle employees in the Information Technology, Product Development and Support areas . . . Even after controlling for such factors in the analysis . . . Based upon the analyses conducted . . ."). Please confirm that you will be producing documents in response to requests using these mutually understood terms. RFP Nos. 9-11, 19, 25, 33, 39, 47, 52, 64, 77, 78, 81.

XIX. Oracle reserves its rights but clarifies that at this time, it is not seeking drafts of statistical analysis (RFP Nos. 9-11, 16, 19, 25, 30, 33, 39, 44, 47, 61, 64, 74-77, 81)

Oracle has requested several "drafts" of statistical analyses, for example, RFP No. 9 seeks draft and final documents "showing underlying statistical data, methodologies, models and actual computations used to determine the standard deviation, as well as DOCUMENTS showing calculations and/or methodologies different from what is represented in Paragraph 7 [of the amended complaint]." Likewise, Oracle's definition of "case analyses" includes "drafts."

Without waiving our right to seek these draft documents at some later point in time, Oracle is willing to clarify these requests as seeking only the final documents. Please confirm that OFCCP will respond to Oracle's RFP Nos. 9-11, 16, 19, 25, 30, 33, 39, 44, 47, 61, 64, 74-77, 81 as clarified.

XX. Oracle reserves its rights but clarifies that it will seek only "sufficient documents" to identify certain alleged persons instead of "all documents" (RFP Nos. 12, 13, 26, 27, 40, 41)

Oracle's RFP Nos. 12, 13, 26, 27, 40, and 41 request "all documents that identify" certain individuals that OFCCP references in paragraphs 7, 8, 9, and 10 of the amended complaint. During our meet and confer, OFCCP asked whether Oracle would accept "sufficient documents" to identify these individuals. Without



Norman E. Garcia
July 27, 2017
Page 11

waiving our right to seek all of the documents encompassed within these requests should the issue be presented to the ALJ at some later point in time, at this time we are willing to accept "sufficient documents to identify" these individuals instead of "all documents that identify." Please confirm that OFCCP will respond to Oracle's RFP Nos. 12, 13, 26, 27, 40, and 41 as modified.

XXI. Oracle clarifies "conclusions" in RFP Nos. 13, 27, 41

OFCCP sought clarification of the word "conclusions" in meet and confer. OFCCP did not object to this term and it is disingenuous to suggest that OFCCP cannot respond to the RFP based on the use of this term. Nonetheless, with respect to RFP Nos. 13, 27, and 41, Oracle clarifies that the word "conclusions" means "basis for the allegations."

XXII. OFCCP's position on RFPs being "subsets" of each other is not well taken

During meet and confer, OFCCP suggested that some RFPs may be subsets of one another or that the responsive documents may be subsets of one another. See, e.g., RFP Nos. 3, 6-7, 15-24, 27-30, 33, 36-37, 42, 63, 80-81, 83-85. As I stated in meet and confer, this fact, even if true, is irrelevant. If true, OFCCP can indicate that documents are responsive to more than one request. There is no requirement that RFPs be mutually exclusive. Furthermore, OFCCP did not object to any requests as being a subset of each other.

XXIII. Oracle will revise its definition of "case analysis" to exclude draft documents (RFP Nos. 16, 30, 44, 61)

Oracle first notes that OFCCP did not object to its definition of "case analysis" or "case analyses" in its responses to RFPs. RFP Nos. 16, 30, 44, 61.

Without waiving our right to seek these draft documents should the issue be presented to the ALJ at some later point in time, Oracle is willing to clarify its definition of case analysis such that it does not seek draft documents. Thus, the definition would read: "CASE ANALYSIS" and all its variants, including "ANALYSES", means any and all *non-draft* narratives, summaries, chronologies, determination memorandums, enforcement memorandums, statistical summaries, methodologies, models, actual computations and regression and other statistical analyses." (emphasis added).

OFCCP's other stated concerns about the definition of case analyses are not well taken. OFCCP contended that case analysis listed potentially duplicative definitions because it listed "statistical summaries, methodologies, models, actual computations and regression and other statistical analyses." This stated concern is disingenuous. First, as OFCCP knows and as it did in its own requests for production, parties use several similar, potentially overlapping terms as a commonplace and accepted way to draft discovery requests. See, e.g., OFCCP's RFPs to Oracle ¶ 10 ("DOCUMENT" means "all



Norman E. Garcia
July 27, 2017
Page 12

writings of any kind including . . . all copies of documents by whatever means made, including, but not limited to: papers, letters, correspondence, emails . . .") ¶ 19 ("Relating to" means "constituting, memorializing, evidencing, containing, showing, supporting, contradicting, summarizing, pertaining to, or referring to, whether directly or indirectly, the subject of the particular request.").

Second, as I stated during our meet and confer, it does not matter if a request contains potentially duplicative terms. If that is the case, then the same documents that would be responsive to the RFP with the first term would also be responsive to the request with the second term. Thus, it does not matter whether or how "methodology" and "statistical analyses" are different in a theoretical sense. Without the specific context of what potential documents OFCCP is contemplating, I'm unable to further clarify the definitions for case analysis further.

XXIV. Oracle seeks interview notes and summaries, or at least confirmation that any withheld documents are listed on the privilege log (RFP Nos. 17, 31, 45, 62, 83)

RFP Nos. 17, 31, 45, 62 request "interview notes, summaries and memoranda" and RFP No. 83 requests all documents related to any "interviews" that OFCCP conducted to the extent that they relate to the allegations in the complaint.

Definition of "Interview": During meet and confer OFCCP asked for clarification of "interview." Although OFCCP did not object to "interview" in its written responses, Oracle is willing to clarify. While not an exhaustive definition, "interview" includes, but is not limited to, the formal and informal interviews described in the FCCM 2M00. "Interview" also includes, but is not limited to any interaction or correspondence between OFCCP and an individual that OFCCP considers to be an interview. "Interview" would not include correspondence between OFCCP and Shauna Holman Harries during the compliance review.

Redacted Manager Interview Summaries: OFCCP has produced a number of what I will refer to as "manager interview summaries" based on interviews that OFCCP conducted during its audit of Oracle HQCA. See, e.g., DOL 511-516, 695-700. However, several of these manager interview summaries have been redacted by OFCCP. Oracle is entitled to unredacted manager summaries as they are relevant to the claims and defenses in this case. See Fed. R. Civ. P. 26.

Notably, none of OFCCP's redactions of manager interview summaries are justified under the informant's privilege. The informant's privilege protects the "identity of an informer." *Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged"). Here, however, Oracle already knows the identity of the managers interviewed. In fact, as OFCCP knows, Oracle arranged many, if not all, of the



Norman E. Garcia
July 27, 2017
Page 13

manager interviews. Because the managers' identities are already known, the informant's privilege does not apply.⁶

Furthermore, even if any of OFCCP's concerns about the substance of the redacted manager interview summaries had merit—which it does not—the ALJ has issued a protective order regarding the use of confidential information which should allay any of OFCCP's concerns. For example, the unredacted manager summaries could be produced to Oracle with the instruction that they are for attorney's eyes only. As I have mentioned in previous correspondence to OFCCP, Oracle is willing to stipulate to such a provision. Thus, OFCCP has no justification to redact the manager interview summaries.

An additional and independent basis for producing certain redacted manager interview summaries exists. Several redacted manager interview summaries have been redacted although an Oracle manager was present. These include the following persons: Eva Clark, Monica Dahlen, Bhupesh Gandhi, Editt Gonen-Friedman, Sung Pack Hong, Kemp Kaboga-Miller, Greg Lunsford, Yen Tang, and Ryan Zhang. See, e.g., DOL638-649, 658-665, 670-678, 684-687, 688-694, 707-709, 732-734. Since an Oracle representative was present for the portion of the interview that OFCCP has ostensibly redacted, the unredacted manager interview summaries should be produced.

OFCCP Has Not Produced Documents of Other Interviews: In addition to interviews with managers, Oracle's RFPs encompass OFCCP's interviews with third parties and OFCCP interviews with former employees. RFP Nos. 17, 31, 45, 62, 83. Oracle is entitled to documents as they are relevant to the claims and defenses in this case. See Fed. R. Civ. P. 26.

To the extent that OFCCP claims that any of these interviews are covered by the informant's privilege, again Oracle disputes that assertion. First, as stated above, the informant's privilege protects the "identity of an informer," not the underlying information. *Roviaro v. United States*, 353 U.S. 53, 59 (1957) ("where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged"). Alternatively, even if the privilege were to apply, Oracle should receive those memos in redacted format that removes only identifying information. See *Solis v. Seafood Paddler of San Rafael, Inc.*, No. 12-CV-0116 PJH (NC), 2012 WL 12547592, at *4 (N.D. Cal. Oct. 16, 2012) ("Finding that no identifying information exists within the text of the letters, the Court orders the Secretary to produce the documents, redacting only the names and addresses of confidential informants.").

OFCCP Should Produce FCCM Interview Notes: OFCCP should produce interview notes contemplated in the Federal Contract Compliance Manual section 2M00.f. That section states: "Formal Interviews. After a formal interview, the CO must ask each person to read, sign and date the CO's

⁶Importantly, Oracle has not—and there is no evidence that Oracle has—retaliated against any employee interviewed by OFCCP.



Norman E. Garcia
July 27, 2017
Page 14

interview notes. At the conclusion of the interview, the CO will review the questions asked and the answers given, and obtain confirmation that any direct quotes are accurate and that all paraphrases convey the interviewee's intended meaning. The CO will promptly type the handwritten interview notes using MS Word in order to provide the interviewee with a hard copy to sign as soon as possible after the interview. The CO must enter the following phrase above the space where the interviewee will sign: "I have read the above and it is a true and accurate to the best of my knowledge." See, e.g., DOL 575-593. Please produce these interview notes.

Oracle cannot limit time or scope without OFCCP's position: During meet and confer, OFCCP asked if Oracle would limit RFP No. 83 to a particular time period or HQCA. However, this proposal is not viable unless OFCCP will stipulate in writing that it will likewise not rely on evidence with respect to other time periods or other Oracle sites.⁷ Without this stipulation, Oracle will need evidence of interview documents to defend itself against OFCCP's claims.

In sum, OFCCP cannot fail to produce unfavorable (or favorable) substantive discussions that it had with Oracle managers, former employees, or other third parties that are relevant to the parties' claims and defenses. OFCCP must produce documents responsive to RFP Nos. 17, 31, 45, 62, 83. Please confirm that OFCCP will produce documents responsive to these requests or confirm whether you are withholding documents based on privilege. To the extent that you are not producing documents, please confirm whether or not your privilege log lists drafts of interview summaries or notes that were taken before they got into final form and if not, what dates they do not cover.

XXV. Oracle defines "victims" in RFP Nos. 26, 40, 48 as "those who were discriminated against"

OFCCP sought clarification of the word "victims" in meet and confer. OFCCP did not object to this term and it is disingenuous to suggest that OFCCP cannot respond to the RFP based on the use of this term. Nonetheless, Oracle defines "victims" in RFP Nos. 26, 40 and 48 as "those who were discriminated against."

XXVI. Oracle will not further narrow RFPs regarding communications (RFP Nos. 18, 32, 46, 63)

During the meet and confer process, OFCCP suggested limiting the communications sought in RFPs 18, 32, 46, 63 to just communications between OFCCP, on the one hand, and class members and their attorneys in the others. However, these requests are already limited because they are required to be "RELATE[D] to the allegations described in . . . the Amended Complaint." Without more context, Oracle cannot agree to narrow this request. OFCCP could have had relevant non-privileged communications with other agencies or consultants. See, e.g., FCCM 1B05 (contemplating communication with other

⁷ OFCCP has already produced at least one interview from another, non-HQCA audit. DOL 575-593.



Norman E. Garcia
July 27, 2017
Page 15

divisions of DOL, the EEOC, VETS, and other agencies). Of course, if OFCCP contends that such communications are privileged, it may so indicate on a privilege log. Furthermore, Oracle is willing to discuss the process of retrieving such communications, and willing to meet and confer over custodians and search terms.

XXVII. OFCCP's objections to the terms "adopt" and "endorse" in RFP No. 33 are not well taken but in any event, Oracle defines them using the common dictionary definition

With respect to RFP No. 33, OFCCP's objections to common terms like "adopt" and "endorse" are not well taken. Oracle refers OFCCP to the dictionary definitions of "adopt" and "endorse."

<https://www.merriam-webster.com/dictionary/adopt> ("to accept formally and put into effect");

<https://www.merriam-webster.com/dictionary/endorse> ("to approve openly"). See *Miller v. Akanno*, No. 1:12-CV-01013-LJO-SK, 2015 WL 566304, at *2 (E.D. Cal. Jan. 16, 2015) ("In determining the 'plain meaning' of a word, we may consult dictionary definitions, which we trust to capture the common contemporary understandings of the word.") (internal citations omitted).

XXVIII. Oracle's RFP Nos. 34, 40, 48, 52 and 68 contain inadvertent misquotations to the complaint; OFCCP can accept Oracle's clarifications or Oracle will propound new RFPs

Oracle's RFP No. 34 contains an inadvertent misquotation of the complaint. RFP No. 34 seeks "All DOCUMENTS RELATED to the claim in Paragraph 9 of the Amended Complaint that 'Oracle discriminated against qualified *Asian employees* in Product Development *roles*' at HQCA." (emphasis added). However, Oracle meant to cite the language in the amended complaint which alleges "Oracle discriminated against qualified *Asians* in Product Development *job functions*" (emphasis added). Thus, Oracle clarifies that RFP No. 34 should request: All DOCUMENTS RELATED to the claim in Paragraph 9 of the Amended Complaint that "Oracle discriminated against qualified Asians in Product Development job functions" at HQCA.

Oracle's RFP No. 40 requests "All DOCUMENTS that identify the Asians that YOU allege are victims of the alleged discrimination described in *Paragraph 8* of the Amended Complaint" (emphasis added). However, this should read "All DOCUMENTS that identify the Asians that YOU allege are victims of the alleged discrimination described in *Paragraph 9* of the Amended Complaint." (emphasis added).

OFCCP claimed that RFP No. 48 contained an inaccurate quote. However, Oracle RFP No. 48 requests "All DOCUMENTS RELATED to the allegation in Paragraph 10 of the Amended Complaint that ORACLE discriminates against qualified ["non-Asian"] applicants in favor of Asian applicants, particularly Asian Indians based upon race for positions in the ["PT1"] job group and Product Development line of business (or job function) at Oracle Redwood Shores." Paragraph 10 reads: "Oracle utilized and, on information and belief, continues to utilize a recruiting and hiring process that discriminates against qualified African



Norman E. Garcia
July 27, 2017
Page 16

American, Hispanic and White (hereinafter 'non-Asians') applicants in favor of Asian applicants, particularly Asian Indians, based upon race for positions in the Professional Technical 1, Individual Contributor ('PT1') job group and Product Development line of business (or job function) at Oracle Redwood Shores." The only differences appear to be a missing comma after "Asian Indians" and the use of brackets to shorten "Professional Technical 1, Individual Contributor ("PT1")" to "PT1." Oracle fails to see how these changes are objectionable but in any event, will clarify that RFP No. 48 is meant to include a comma after "Asian Indians" and the bracketed "PT1" refers to the quoted language in the complaint "Professional Technical 1, Individual Contributor ('PT1')."

OFCCP also claims that RFP No. 52 contains an inaccurate quote. RFP No. 52 requests "All DOCUMENTS RELATED to the allegation in Paragraph 10 of the Amended Complaint that ORACLE 'hired 82% Asians into the PT1 job group ... exceeding the 73% of Asians who applied and resulting in statistically significant adverse impact against non-Asian applicants.'" The Amended Complaint states "Specifically, Oracle hired 82% Asians into the PT1 job group *during the period January 1, 2013 through June 30, 2014*, exceeding the approximately 75% of Asians who applied and resulting in statistically significant adverse impact against non-Asian applicants." Oracle clarifies that its quote of 73% should have been 75%. OFCCP took issue with the use of ellipses in the RFP. Oracle disagrees that the use of ellipses was improper but in any event clarifies that RFP No. 52 should read: All DOCUMENTS RELATED to the allegation in Paragraph 10 of the Amended Complaint that ORACLE "hired 82% Asians into the PT1 job group during the period January 1, 2013 through June 30, 2014, exceeding the approximately 75% of Asians who applied and resulting in statistically significant adverse impact against non-Asian applicants."

In RFP No. 68, the request seeks: All DOCUMENTS RELATED to the allegation in Paragraph 13 of the Amended Complaint that "Oracle failed to provide any evidence that it conducted an adverse impact *analysis*." (emphasis added). Oracle clarifies that RFP No. 68 should read: All DOCUMENTS RELATED to the allegation in Paragraph 13 of the Amended Complaint that "failed to provide any evidence that it conducted an adverse impact *analyses*." (emphasis added).

XXIX. Oracle cannot agree to limit RFP Nos. 14, 28, 42, 54

OFCCP requested that Oracle limit RFP Nos. 14, 28, 42 and 54, by just comparisons between individuals that caused OFCCP to determine the particular standard deviation. However, the RFPs are already limited by asking for comparisons used to form the allegations in the complaint. For example RFP No. 42 requests: All DOCUMENTS RELATED to the comparisons YOU made between any "Asians" an any "comparable Whites employed in similar roles" as described in Paragraph 9 of the Amended Complaint. These RFPs are already sufficiently narrowed to just those comparisons relevant to the allegations in this complaint.



Norman E. Garcia
July 27, 2017
Page 17

XXX. Oracle cannot agree to limit RFPs requesting OFCCP's case files (RFP Nos. 15, 29, 43, 60)

As stated in Erin Connell's March 27, 2017 letter, Oracle believes that OFCCP's limitation of documents to those in the investigative file is improper. As detailed in that letter, the OFCCP publishes a Federal Contractor Compliance Manual (FCCM). Section 1B02 of the OFCCP's FCCM is entitled "Creation and maintenance of the *case file*." (emphasis added). Thus, OFCCP's claimed confusion about "case file" is not well taken. Furthermore, OFCCP did not object to Oracle's RFPs on the ground that "case files" were vague and ambiguous. Nor could it. The Federal Contractor Compliance Manual details certain documents kept within a case file such as a "compliance officer notes, worksheets and analyses, including any regression analyses"; "witness statements"; "contractor records"; and "other information and records pertinent to the issues investigated." OFCCP should produce these documents, or at minimum, confirm that they are all listed on a privilege log if OFCCP maintains a privilege. Please confirm that OFCCP will respond to RFP Nos. 15, 29, 43, 60.

XXXI. OFCCP must provide an affidavit asserting government privilege at the time it asserts the privilege, not later

During our meet and confer discussion, you asked for additional authority supporting our position that OFCCP had waived its executive privileges for failure to provide a timely affidavit. In addition to the authorities cited in our previous letters, we also refer you to *Miller v. Pancucci*, 141 F.R.D. 292, 300 (C.D. Cal. 1992) ("[T]he following procedural requirements discussed by the courts in Kelly and Kerr are required of those who seek to invoke the 'official information' privilege in federal question cases. . . . [T]he party must submit, at the time it files and serves its response to the discovery request, a declaration or affidavit, under oath or subject to the penalty of perjury, from the head of the department which has control over the matter.").

XXXII. Oracle is entitled to documents related to OFCCP's allegation that it conciliated in the amended complaint (RFP Nos. 71 and 72)

As we discussed, RFP Nos. 71 and 72 are directly related to the allegations in the amended complaint that OFCCP attempted to conciliate with Oracle and that its conciliation efforts were unreasonable.

OFCCP's criticism that conciliation is not relevant is not well taken. The ALJ denied Oracle's motion for summary judgment finding that whether OFCCP had made reasonable efforts to conciliate was an issue of fact and denied summary judgment on that basis. Furthermore, Oracle maintains that OFCCP has not made reasonable efforts to conciliate. OFCCP's contention that Oracle has admitted that a conciliation has taken place is erroneous. Oracle's position is clear and stated in its summary judgment briefing,



Norman E. Garcia
July 27, 2017
Page 18

Thus, please confirm that OFCCP will respond to RFP Nos. 71 and 72. To clarify, Oracle is requesting all documents prior to OFCCP's filing of the complaint.

XXXIII. RFP No. 73 is clear as written, but Oracle is willing to clarify to include a full quote from amended complaint

During meet and confer, OFCCP criticized RFP No. 73 for not including the full quoted language from the amended complaint. Although Oracle contends that this RFP is understandable and intelligible as written, in the interest of meeting and conferring without intervention by the ALJ, Oracle clarifies that RFP No. 73 is changed to quote the entire language so that it reads: All DOCUMENTS RELATED to the allegation in Paragraph 19 of the Amended Complaint that "Unless restrained by an administrative order, Oracle will continue to violate its obligations under the Executive Order and the regulations issued pursuant thereto."

XXXIV. OFCCP must produce responsive documents to RFPs that refer to the NOV (RFP Nos. 74-78)

OFCCP's concern that RFP Nos. 74-78 are not relevant is not well taken. The OFCCP relies on the NOV as reflecting and providing the factual basis for OFCCP's allegations. OFCCP's Responses to Am. Interrogatories Nos. 2, 4-7, 9-12, 14-17, 20-21.

Additionally, as discussed earlier with respect to Oracle's RFPs that refer to the amended complaint, (1) OFCCP did not specifically object to any request on the ground that it refers to a document outside of the request; (2) the NOV is directly relevant to the allegations in this matter; (3) Oracle's meet and confer discussions with OFCCP with respect to OFCCP's document requests are not a legitimate basis for OFCCP to withhold or not produce documents in response to Oracle's document requests. As the correspondence reflects, it is not merely OFCCP's reference to materials outside of OFCCP's document requests that is at issue. Part and parcel to the objection is the fact that the reference to other materials calls for a legal conclusion. Thus, OFCCP must produce documents in response to Oracle's RFPs that refer to the NOV, at least as clarified below. RFP Nos. 74-78.

XXXV. RFP Nos. 74 and 78 are clear as written, but Oracle is willing to clarify

During meet and confer, OFCCP criticized RFP Nos. 74, and 79 for not including the full quoted language from the NOV. Additionally, OFCCP requested clarification of whether final versions was in plural or singular and requested definitions of work papers, controls, employ, and account. Although Oracle contends that RFP Nos. 74, 76, and 79 are understandable and intelligible as written, in the interest of meeting and conferring without intervention by the ALJ, Oracle clarifies that RFP No. 74 is changed to read: All DOCUMENTS RELATED to the allegation in Violation 2 of the NOV that YOU "evaluated and analyzed Oracle's compensation system and, through regression and other analysis, found statistically significant pay disparities based upon sex after controlling for legitimate explanatory factors." This request